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I. ARGUMENT

The United States Court of Appeals for the Ninth Circuit correctly decided this case. In *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010), the Court thoroughly analyzed the elements of Article III standing before concluding it was not shown here.

Petitioner Jonathan Lopez, a student in the Los Angeles Community College District ("the District"), asserted a facial overbreadth challenge to the District's former sexual harassment policy. Petitioner had been subjected to inappropriate comments and conduct by his speech class professor following a classroom speech containing religious themes. But as the Court of Appeals opinion describes, the record contained no evidence that the District intended to invoke the sexual harassment policy against Petitioner. No one even *mentioned* the policy to him. After the administration learned all the facts regarding the classroom incidents, the District stated that no student, including Petitioner Lopez, would be disciplined. Instead, the professor was disciplined, and Petitioner ultimately received an "A" in the class. *Lopez*, 630 F.3d at 784.

Petitioner's evidence did not show that he sought to engage in any speech that would actually violate the District's sexual harassment policy. His verified complaint stated only, in very general terms, that he intended to speak about "his Christian views on politics, morality, social issues, religion, and the like," and that he wished to "share[ ] his beliefs about

Christianity with others," which means "discuss[ing] his faith and how it applies to guide his views on political, social, and cultural issues and events," but felt chilled from speaking by the sexual harassment policy. *Lopez*, 630 F.3d at 790. As the Court of Appeals explained, this does not even arguably qualify as "sexual harassment" under the policy Petitioner challenged. The lack of any credible threat that the District would enforce the policy against Petitioner led the Court of Appeals to conclude that Petitioner did not satisfy the "'irreducible constitutional minimum of standing' necessary to challenge the policy." *Id.* at 785 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

The Petition's argument that this Court's decision creates a circuit split is unfounded. The two primary circuit court cases Petitioner cites, *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010), and *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), rest in pertinent part on the doctrine concerning facial overbreadth challenges, not Article III standing. Also, to the extent *Dambrot* can be interpreted to address Article III standing, its analysis is superseded by the Sixth Circuit's decision in *Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602 (6th Cir. 2008), which directly supports the decision here by holding that conclusory allegations of chilling effect on speech in the university context did not confer standing. *Id.* at 610. The third case cited by Petitioner for a supposed

circuit split, *Zamecnik v. Indian Prairie School Dist.*, 2011 WL 692059 (7th Cir. March 1, 2011), does not address Article III standing requirements or the overbreadth doctrine. It does not even mention them.

Section II of this Brief discusses why the instant case is not part of any circuit split, but is aligned with current United States Supreme Court and Court of Appeals precedent governing principles of standing. Section III of this Brief describes why the Petition's Questions Presented section is flawed and how it purports to present issues for consideration that do not have support in the record. Section IV describes why the *Lopez* case ably follows this Court's guidance on how Article III should interpreted.

II. THERE IS NO CIRCUIT SPLIT CONCERNING WHEN A STUDENT HAS ARTICLE III STANDING TO CHALLENGE A COLLEGE POLICY ON OVERBREADTH GROUNDS

Petitioner contends that the decision of the Court of Appeals contributes to a circuit split. (Petition for Writ of Certiorari at 1.) There is no circuit split, because the cases Petitioner cites as conflicting are distinguishable. Moreover, none actually even discusses Article III standing.

Indeed, the Petition frequently intermingles the generous standing rules applicable to facial overbreadth challenges with the preliminary requirement that one must show Article III standing before being

able even to make such a challenge. A facial overbreadth challenge under the First Amendment exempts a plaintiff from the traditional prudential rule against third party standing, i.e., allows the plaintiff to assert the free speech rights of third parties to show a policy or statute is overbroad. But the overbreadth doctrine does *not* relieve plaintiffs from establishing Article III standing in the first place. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 554 (9th Cir. 2003). It was Article III standing that Petitioner lacked here. *See Lopez*, 630 F.3d at 788-93.

A. *McCauley v. University of the Virgin Islands* Is Distinguishable

The first case cited by Petitioner, *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010), is distinguishable because it addresses standing to challenge provisions based on overbreadth, and does not address Article III standing. In *McCauley*, the student in fact suffered discipline under the policy he challenged, and thus had standing under Article III. The Court was then required to decide whether the law governing overbreadth challenges allowed the student to challenge portions of the student policy in addition to those applied to him.

The underlying facts of *McCauley* confirm that it is rooted only in prudential standing related to facial overbreadth challenges. McCauley, a student at the University of the Virgin Islands, was charged by the

University, and punished, for his speech and conduct toward the victim of an alleged rape. The University found him guilty of violating Paragraph E of the university disciplinary rules involving acts that inflict mental harm on students. The student sued, alleging Paragraph E infringed free speech rights, but also that other Paragraphs were facially overbroad under free speech principles – including B (lewd behavior), H (conduct that causes emotional distress), and R (misbehavior at sports events, concerts, and other events). *McCauley*, 618 F.3d at 238-39. At trial, the student conceded he had suffered "no deprivations" under these paragraphs, but the Third Circuit found his testimony irrelevant. But this was not because the concession did not matter for purposes of Article III standing, but because it did not matter for purposes of an overbreadth challenge, which considers the speech rights of third parties:

> Despite McCauley's trial testimony that he suffered no deprivations from Paragraphs B, H, and R, we conclude that he has standing to challenge those paragraphs. The "judicial prediction or assumption" that Paragraphs B, H, and R "may cause others not before the court to refrain from constitutionally protected speech or expression," *Broadrick*, 413 U.S. at 612, 93 S.Ct. 2908, was not disturbed by McCauley's testimony.

McCauley, 618 F.3d at 238. Indeed, *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), cited by the Third Circuit, is a case addressing facial overbreadth, not injury-in-fact

necessary for standing under Article III. *See id.* at 612-13. Thus, *McCauley* does not address Article III standing. Instead, the Third Circuit evidently assumed standing existed because the plaintiff had been disciplined under the policy. Indeed, the Ninth Circuit in its opinion here distinguishes the *McCauley* decision on this basis. *See Lopez*, 630 F.3d at 792-93.

B. *Dambrot v. Central Michigan University* Is Distinguishable

The second case cited by Petitioner for a circuit split, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), is also inapposite. At the outset, the case contains no discussion of Article III standing at all. As with *McCauley*, its only discussion of standing relates to the ability of plaintiffs asserting overbreadth challenges to assert the rights of third parties. *Id.* at 1182.

In addition, *Dambrot* is distinguishable on its facts. In *Dambrot*, the university's head coach was disciplined, and his agreement to coach was not renewed, because he used a racial slur in talking with the players. He sued claiming wrongful termination. *Id.* at 1181. Several basketball players joined the suit and challenged the harassment policy on overbreadth grounds. *Id.* The record showed that the student basketball players who challenged the university policy on racial harassment themselves used the same racial slur that had caused their coach to lose his job. The District Court sustained the challenge of

the coach and players, and the Sixth Circuit affirmed. *Id.* at 1181-82.

Petitioner suggests that this ruling in *Dambrot* contradicts the *Lopez* holding because the Sixth Circuit allowed the players to proceed with a facial overbreadth challenge without showing they were disciplined or threatened with discipline under the harassment policy. (*See* Petition for Writ of Certiorari at 24.) The contention lacks merit because the record showed that "[t]he players often referred to each other using" the racial slur, including "during games and around campus and in the locker room." *Dambrot*, 55 F.3d at 1180. The student plaintiffs *were* engaged in exactly the same speech that had resulted in discipline of their coach under the policy (and ultimately non-renewal of his contract). This is in direct contrast to this case. Here, Petitioner Lopez did not allege facts to show the District had *ever* viewed speech such as his as violating the District sexual harassment policy, nor did he allege that he wished to engage in any speech which could arguably be viewed as "verbal conduct . . . of a sexual nature" covered by the policy. *See Lopez*, 630 F.3d at 790-91.

Petitioner argues that the Court of Appeals here accepted an argument that the *Dambrot* Court rejected, specifically that a harassment policy is not overbroad if the University disavows any intent to apply it in particular circumstances. (Petition for Writ of Certiorari at 25-26 (citing *Dambrot*, 55 F.3d at 1183).) The contention fails because the Court of Appeals here did not rely on that argument. Indeed, the Court

never needed to reach the merits of the overbreadth challenge. The Court did note a statement in correspondence from Dean Allison Jones to Petitioner's lawyers in response to the Matteson incidents that "First Amendment rights will not be violated." *Lopez*, 630 F.3d at 791-92. But the Court here did not treat the statement by Dean Jones as carving out an exception to the policy. Rather, it was simply one fact among many which persuaded the Court that the District did not believe the sexual harassment policy applied to Lopez's speech at all. *Id.* at 788-92.

C. The Opinion Of The Court Of Appeals Is Consistent With The Sixth Circuit's Decision In *Morrison v. Board of Education of Boyd County*

Even if the 1995 *Dambrot* decision, discussed above, addressed standing (and it did not) the case would be effectively superseded by the Sixth Circuit's own substantially more detailed analysis in its 2008 decision, *Morrison v. Board of Educ. of Boyd County*, 521 F.3d 602 (6th Cir. 2008). The case, in fact, confirms that the decision here is aligned with existing case law.

In *Morrison*, a high school student alleged that he wished to express his religious views against homosexuality on campus but did not do so out of fear of violating a policy that prohibited creating a "hostile or abusive educational environment" through statements "insulting" or "stigmatizing" to individuals. *Id.*

at 605-06. The Court held that a student's purely subjective allegations of chilling effect did not confer Article III standing: "With respect to the standing of First Amendment litigants, the Supreme Court is emphatic: 'Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Morrison*, 521 F.3d at 608 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)). The Court further noted that:

> The claim at stake here involves Morrison's choice to chill his own speech based on his perception that he would be disciplined for speaking. . . . [But] the record is silent as to whether the school district threatened to punish or would have punished Morrison for protected speech in violation of its policy.

Id. at 610.

The *Lopez* opinion in the instant case is consistent with *Morrison*.

D. *Zemecnik v. Indian Prairie School District* Is Distinguishable

The third case relied on by Petitioner for a purported circuit split, *Zamecnik v. Indian Prairie School Dist. No. 204*, 2011 WL 692059 (7th Cir. 2011), has no analysis of either Article III standing *or* overbreadth. It does not even contain these words. Nor does the additional case that arises from the same set of facts, *Nuxoll v. Indian Prairie School Dist. No. 204*, 523

F.3d 668 (7th Cir. 2008), which Petitioner offers as a key to the Article III meanings in *Zamecnik*. Petitioner interprets these opinions, taken together, to mean that Nuxoll was allowed to challenge a policy that had never been enforced against him, based only on its chilling effect. This is not accurate.

In *Zamecnik* and *Nuxoll*, a high school stopped one student, Zamecnik, from wearing a t-shirt that contained a message "Be Happy, Not Gay" (the school required that the words "Not Gay" be inked out). Another student, Nuxoll, alleged he wished to wear a t-shirt with the same message, and ultimately succeeded in obtaining injunctive relief allowing him to do so, and nominal damages. The result of these Seventh Circuit cases (and whatever is implied in them concerning standing) does not conflict with *Lopez*. Nuxoll was able to allege and prove he wished to engage in the specific conduct *that had already drawn action* from the school pursuant to its disciplinary policy, specifically wearing a t-shirt that had a very specific message on it. Here, by contrast, Petitioner Lopez did not allege he wished to engage in conduct that constituted "sexual harassment" within the four corners of the policy, or in conduct that had ever been construed as "sexual harassment." No one mentioned the policy to him, and there was no record that the District had enforced the policy against *anyone*. *See Lopez*, 630 F.3d at 791.

The Seventh Circuit said nothing about Article III or the overbreadth doctrine in *Zamecnik*. The case does not establish a circuit split.

E. The Opinion Of The Court Of Appeals Is Consistent With The Fourth Circuit's Unpublished Recent Decision In *Rock for Life UMBC v. Hrabowski*

The decision here *is* consistent with the Fourth Circuit's unpublished but detailed and thorough decision in *Rock for Life UMBC v. Hrabowski*, 2010 WL 5189456 (4th Cir. Dec. 16, 2010). There, the Court found that a plaintiff student-organization that engaged in abortion protests lacked standing to challenge a state university's sexual harassment policy, even though its members had alleged that the policy chilled their expression. The reasoning of the case is similar to that here, and relies in part on the plaintiff's inability to show how the planned speech qualified as sexual harassment under the terms of the policy at issue. *See id.* at **5-7.

F. Other Authorities Cited By Petitioner Are Inapposite

The Petition cites a number of additional cases from the Third Circuit (which decided *McCauley*, discussed above) which the Petition argues create a conflict with the standing analysis of the Court of Appeals in *Lopez*. Like *McCauley*, the cases are inapposite or distinguishable.

First, in *Dejohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008), the parties did not argue, and the Court did not discuss, Article III standing. The Court's opinion only recites that the plaintiff, a

history graduate student, felt inhibited in his discussions and class work because of the university's sexual harassment policy. *Id.* at 305. The Court did not consider the issue further. Also, the policy language which it considered applied by its terms in a very nebulous manner to expressive conduct of a "gender-motivated nature." *Id.* No such language exists in the policy at issue in this case.

Similarly, the opinion in *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3d Cir. 2001), nowhere discusses any challenge to standing. The opinion only recites that plaintiffs were two high school students who wished to "speak out about the sinful nature and harmful effects of homosexuality" and wished to distribute literature, but felt "likely to be punished" under the school's harassment policy. *Id.* at 203-04. The Court's discussion of standing went no further. In addition, the students' statement of intent to speak in *Saxe* more clearly implicates the policy at issue in that case than Lopez's very generalized assertion of his intended speech does the policy in this case. *See Lopez*, 630 F.3d at 790.

The Petition's Section I.E collects a number of additional cases from outside the context of student challenges to college and university policies to support the proposition that proof of an "objectively reasonable" chilling effect will confer Article III standing to make a First Amendment challenge before a law has been enforced against the plaintiff. (*See* Petition for Writ of Certiorari at 30-33.) The cases, which have been culled from a variety of factual contexts, do not

conflict with the *Lopez* decision because *Lopez* does not hold that a pre-enforcement challenge can never be brought – rather, *Lopez* analyzes the particular and unique facts of the instant case, using established case authorities on standing. It determines that based on all the facts and circumstances presented, Lopez did not make a sufficient showing. *Lopez*, 630 F.3d at 794. The *Lopez* decision is fact-based and does *not* present a square conflict with cases considering pre-enforcement challenges in different circumstances.

III. THE "QUESTIONS PRESENTED" IN THE PETITION MISSTATE APPLICABLE FACTS AND LAW

Although the gravamen of the Petition relates to the standing issue, it contains additional significant misstatements regarding this case that must be addressed in this response.

A. The Introduction To The Questions Presented Misstates And Misrepresents The Sexual Harassment Policy At Issue

The introductory language to the Petition's "Question Presented" section argues that the District's policy at issue "prohibits students from engaging in speech deemed 'offensive,' 'harassing,' 'degrading,' and 'sexist' as subjectively defined by listeners and administrators." (Petition for Writ of Certiorari at p.i.) This is a misstatement of the sexual harassment policy at issue. The *only one* of these

words that appears in the policy itself is "offensive," and it applies in the course of defining harassment exactly as this Court has defined it: "verbal conduct" that leads to an "intimidating, hostile, or offensive work or educational environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). The actual policy language at issue is section 15003(A), which uses the exact definition of sexual harassment contained in California Education Code section 212.5. It defines harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the workplace or in the educational setting, under any of the following conditions: . . . (3) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile or offensive work or educational environment.

Lopez, 630 F.3d at 781.[1] This language is, in turn, based on a federal standard set out by the EEOC in 29 C.F.R. section 1604.11(a). This is the language

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[1] Because the language is derived from Education Code section 212.5, it is not, as Petitioner insinuates, the peculiar creation of administrators at a single college district. It is the language formulated by the California Legislature and has set the legal standard for sexual harassment at colleges throughout California for over twenty years.

considered by the Trial Court here, and the language that is at issue.

The introduction to the Questions Presented section of the Petition improperly weaves advisory wording from former District *websites* into its arguments so that it appears those words were actually *part of* the sexual harassment policy. In doing so, it scrambles both the language and the standards that are actually at issue.

The website phrases are not part of the policy. Students at District colleges could only be disciplined for violation of the policy itself, i.e., Section 15003(A). Indeed, the Trial Court's July 10, 2009 Order, although it cited the website language, only analyzed the terms of Section 15003(A) in making its overbreadth determination and its determination that the policy could not be narrowed. (*See* Petition for Writ of Certiorari at 74a-87a.) It issued a preliminary injunction against Section 15003(A) and websites that quoted, paraphrased, explained, or referenced it. (*Id.* at 69a-70a, 89a (enjoining the District's sexual harassment policy, which it defined as "the Policy").) The Trial Court did not apply its injunction to the website language quoted by Petitioner. Nor would it have been warranted for the Court to do so. The law is clear that language in college publications that is "aspirational rather than restrictive" is not subject to First Amendment scrutiny. *Bair v. Shippensburg University*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003).

The website language imposed no disciplinary requirement.[2]

The Petition mixes words and phrases from Section 15003(A) and from advisory websites in support of virtually *every* major argument. This is confusing and improper. It distorts what Petitioner purports to be the Questions Presented to this Court, and the Court should recognize and reject the approach.

B. The First Question Presented Misstates The Record Below, In Which Petitioner's Evidence Did Not Show An Objectively Reasonable Chilling Effect

The Petition's first purported Question Presented assumes facts not supported by the record on appeal, specifically that the District's sexual harassment policy at issue presented an "objectively reasonable chilling effect on student speech" in this case. (*See*

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[2] Indeed, should this Court grant certiorari and hear the case, the District will be able to show that each website from which Plaintiff quotes makes clear that the actual sexual harassment policy is a separate document. The District website (the Complaint's Exhibit 10) had a link to the "Official LACCD Prohibited Discrimination and Harassment Policy." The District "Overview" page had a link for "more details about sexual harassment." The L.A. City College website (the Complaint's Exhibit 11) advised "[R]ead the . . Sexual Harassment policy" and had a separate link to it. The College "Overview" page (the Complaint's Exhibit 13) advised: "Take the time to read your sexual harassment policy."

Petition for Certiorari at p.i.) The Question Presented asks, essentially, whether an "objectively reasonable chilling effect" will confer standing on students to make a facial challenge to college or university policies. But here, there is no evidence in the record that the District's sexual harassment policy *had* an "objectively reasonable chilling effect" on Petitioner or any other student. The Court of Appeals did not find any chilling effect, and instead – as to Petitioner – found the opposite. The Court summarized its reasoning as follows:

> In sum, Lopez has not proposed an interpretation of the policy that would arguably apply to his intended speech and has not given any details about what he intends to say. Therefore, he has failed to prove his intent to violate the policy. Moreover, Lopez has not shown that the District or LACC has enforced the sexual harassment policy against him, interprets the sexual harassment policy as applying to his speech, or is likely to enforce the policy against him in the future. Under these circumstances, we must conclude that Lopez fails to meet the standard required of a pre-enforcement plaintiff to prove injury in fact, because he has not met the low threshold of clearly showing that he faces a specific, credible threat of adverse government action based on a violation of the sexual harassment policy.

Lopez, 630 F.3d at 792.

There is nothing in this language to suggest the alleged chilling effect on Petitioner Lopez's intended speech was objectively reasonable. The Question Presented is thus inapposite.

The first Question Presented also improperly refers to the District's sexual harassment policy as a "speech code." (*See* Petition for Writ of Certiorari at p.i.) This misnomer is repeated over and over throughout the Petition. "Speech code" is a term generally used to describe the broad disciplinary rules colleges enacted in the 1990's to restrict hate speech, but which drew conservative attack. (*See* Kenneth L. Marcus, "Higher Education, Harassment, and First Amendment Opportunism," 16 Wm. & Mary Bill Rts. J. 1025, 1030 (2008).) Petitioner basically admits that calling a policy a "speech code" means that it is constitutionally invalid. (*See* Petition for Writ of Certiorari at 11.) The Court of Appeals never determined this Policy to be one. The term thus does not belong in the Question Presented.

C. The Second Question Presented Ignores The Established Principle That A Party Cannot Use The Overbreadth Doctrine To Assert The Rights Of Others Unless The Party Has Standing Under Article III At The Outset

The second purported Question Presented asks whether a student "so affected" (i e., who experiences an "objectively reasonable chilling effect" as described in the first question) has "standing under the

overbreadth doctrine to assert the rights of others not before the Court." (Petition for Writ of Certiorari at p.i.) The Question is profoundly deficient and deceptive because it *assumes* that an "objectively reasonable chilling effect" can be established here, which plainly it cannot. It also is deficient in that it poses a question that has already been answered by this Court and many others.

Even in a First Amendment free speech case, if a party does not have standing under Article III, they cannot assert the rights of third parties. In the First Amendment case *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984), this Court made it clear that a party seeking to assert the rights of third parties can do so only if the party has shown, as a prerequisite, that the party itself has suffered an injury-in-fact sufficient to satisfy Article III's case or controversy requirement. "Under no circumstances . . . does the overbreadth doctrine relieve a plaintiff of its burden to show constitutional standing." *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 799 (8th Cir. 2006); *accord Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 554 (9th Cir. 2003) (a litigant must have standing in the form of "injury-in-fact" to make a First Amendment overbreadth challenge); *Midwest Media Property, L.L.C. v. Symmes Tp., Ohio*, 503 F.3d 456, 464 (6th Cir. 2007) ("Having suffered no cognizable injury, they lack standing to mount an attack on the township's sign regulations – whether under the overbreadth doctrine or under any other doctrine."). "[T]he overbreadth doctrine does not

relieve Plaintiffs from establishing Article III standing." *Houston Balloons & Promotions, LLC v. City of Houston*, 589 F. Supp. 2d 834, 846 (S.D. Tex. 2008).

The Question Presented also has an answer in common sense. If a litigant does not have sufficient injury-in-fact to have Article III standing, they cannot simply bypass the standing requirement by invoking the injury of a third party. This would eviscerate the standing requirement itself, and clearly cannot be the law. *See Lopez*, 630 F.3d at 792 ("Lopez properly recognized that he may only assert the rights of others "[s]o long as [he] satisfies the injury in fact requirement.").

IV. THE OPINION OF THE COURT OF APPEALS WELL SERVES THE PURPOSES OF ARTICLE III

The United States Supreme Court has described standing as "not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit . . . ; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787. . . ." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-476, 102 Ct. 752, 70 L. Ed. 2d 700 (1982). "The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government." *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

Indeed, this Court very recently, in *Arizona Christian School Tuition Organization v. Winn*, ___ S. Ct. ___, 2011 WL 1225707 (2011), applied Article III to limit the circumstances under which taxpayers could mount constitutional challenges in federal court. This Court articulated the importance of Article III in preserving principles of Separation of Powers. It explained: "Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary. If the judicial power were 'extended to every question under the constitution,' Chief Justice Marshall once explained, federal courts might take possession of 'almost every subject proper for legislative discussion and decision.' 4 Papers of John Marshall 95 (C. Cullen ed. 1984)." *Id.* at *5.

The Ninth Circuit's decision here enforces these principles. It also confirms that, even in the free speech context, federal courts should not artificially dilute principles of Article III standing and thereby take further control over, and responsibility for, the decisions of public educators. Petitioner's proposed expansive approach to standing – allowing students to invoke federal judicial review simply by vouching in a highly conclusory manner that obscure or unenforced college policies chilled their speech – would improperly increase the role of the third branch of federal government in education. It would make federal courts the forum of *first resort* for any student challenge to any policy affecting speech that is

promulgated by a public educational institution (including high school, college, and university), regardless of the obscurity of the policy or whether there is any chance of enforcement. No other branch of federal government would have this increased level of involvement in public education.

Petitioner's proposed expansion of federal jurisdiction would also require federal courts to supersede the rights of states to administer the educational institutions they have created and funded, and would intrude into the domain of educators themselves. Indeed, as this Court recently described in a case concerning First Amendment association rights: "[W]e have cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'" *Christian Legal Soc. Chapter of the University of California, Hastings v. Martinez,* 130 S. Ct. 2971, 2988, 177 L. Ed. 2d 838 (2010) (quoting *Board of Educ. v. Rowley,* 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)). This Court concluded that the educator's "decisions about the character of its student-group program are due *decent respect.*" *Id.* at 2989 (emphasis added). This principle of "decent respect" further supports the ruling of the Court in this case.

V. CONCLUSION

The Court of Appeals in this case thoroughly and correctly applied existing principles of Article III

standing. It reached a result consistent with case law in this area. The cases which Petitioner contends present a circuit split do not in fact do so. Because there is no circuit split to resolve, this Court has no reason to hear this case, even to confirm the decision of the Court of Appeals is correct. For all of the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

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Respectfully submitted,

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